LIBRARY
SUPREME COURT, U. S.

FILED
OCT 3 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 482

MORRIS SMITH, RANDOLPH PHILLIPS, and DAVID WIENER, individually and on their own behalf and that of all other shareholders of Alleghany Corporation similarly situated and derivatively on behalf of ALLEGHANY CORPORATION,

Petitioners,

against

ALLAN P. KIRBY, JR. and FRED M. KIRBY II as Guardians of the Property of ALLAN P. KIRBY: CHARLES T. IRELAND, JR. and ROBERT J. FITZSIMMONS, and ALLEGHANY CORPORATION,

Respondents.

BRIEF OF RESPONDENT ALLEGHANY CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

VINCENT R. FITZPATRICK,
Counsel for Respondent,
Alleghany Corporation,
1 Chase Manhattan Plaza,
New York, N.Y. 10005.

ANTHONY F. PHILLIPS,
of Counsel.

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
The Genesis of This Litigation and Prior Proceedings Below	2
The Genesis of This Litigation	2
Prior Proceedings Below by the Present Petitioners	5
Questions Presented	9
A Consideration of the Reasons Offered by the Petitioners for the Granting of a Writ of Certiorari	9
Conclusion	13

Table of Cases Cited

Alleghany v. Kirby, 218 F. Supp. 164 (S.D.N.Y. 1963) aff'd 333 F.2d 327 (2d Cir. 1964) aff'd on rehearing 340 F.2d 311 (1965) cert. dismissed sub nom. Holt v. Kirby, 384 U.S. 28 (1966) 2, 4, 5, 6, 7, 8, 9, 10, 11, 12

Alleghany Corp. v. Kirby, 344 F.2d 571 4, 5, 6, 7, 9, 10, 11, 12

Breswick v. Briggs 3

Smith v. Fitzsimmons 6, 7, 8, 9, 10, 11, 12

Zenn v. Anzalone 3, 4, 6, 9

Statute Cited

FRCP Rule 60(b)(4) 5, 11, 12

IN THE

Supreme Court of the United States

October Term, 1968

No. 462

MORRIS SMITH, RANDOLPH PHILLIPS, and DAVID WIENER, individually and on their own behalf and that of all other shareholders of Alleghany Corporation similarly situated and derivatively on behalf of ALLEGHANY CORPORATION,

Petitioners,

against

ALLAN P. KIRBY, JR. and FRED M. KIRBY II as Guardians of the Property of ALLAN P. KIRBY: CHARLES T. IRELAND, JR. and ROBERT J. FITZSIMMONS, and ALLEGHANY CORPORATION,

Respondents.

BRIEF OF RESPONDENT ALLEGHANY CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

Petitioners Morris Smith, Randolph Phillips, and David Wiener, suing as stockholders in the right of Alleghany Corporation ("Alleghany"), petition this Court for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit denying their three separate and belated attempts to reopen a judicially approved settlement of certain stockholders' derivative actions which were commenced in 1954.[1]

---

[1] The opinion of the Court below is reported at 394 F.2d 381 and is set forth in Petitioner's Appendix at pages 2132 to 2159.

Previous attempts by other shareholders of Alleghany to reopen the settlement of the same stockholders' derivative actions have been rejected by the District Court for the Southern District of New York, the United States Court of Appeals for the Second Circuit, and this Court *sub nom. Alleghany* v. *Kirby,* 218 F. Supp. 164 (S.D.N.Y. 1963), *aff'd.* 333 F.2d 327 (2d Cir. 1964), *aff'd on rehearing by an equally divided court,* 340 F.2d 311 (1965), *cert. dismissed as improvidently granted after oral argument sub nom. Holt* v. *Kirby,* 384 U.S. 28 (1966).[2]

The Genesis of This Litigation and Prior Proceedings Below

The Genesis of This Litigation

In denying a prior application by petitioners Holt and McMahon to intervene in *Alleghany* v. *Kirby,* Judge Kaufman of the United States Court of Appeals for the Second Circuit prophetically said, "The aspect of [Alleghany's] litigious history presently before us . . . may occupy no more than a footnote when the definitive chronicle is written . . ." (344 F.2d at 572).

Judge Smith, of the same Court, in rejecting the present petitioners' attempts, as erstwhile champions of Alleghany, to reopen the judicially approved settlement of the stockholders' derivative actions commenced in 1954 commented, "This case is, in a sense, a footnote to a footnote." (394 F.2d at 388; Petitioner's App. p. 2145.) Petitioners, by the instant petition, are apparently attempting to add a footnote to a footnote to a footnote to the definitive chronicle of the litigious history of Alleghany.

In 1949-1950, certain directors and officers of Alleghany Corporation, including Allan P. Kirby ("Kirby") exchanged shares of Alleghany owned by the directors and

---

[2] Randolph Phillips, one of the petitioners herein, filed a brief as *amicus curiae* in this Court in *Holt* v. *Kirby.*

officers for shares of Investors Diversified Services (IDS) owned by Alleghany. The propriety of this transaction and other related transactions was challenged in a series of shareholder derivative actions brought on behalf of Alleghany against Kirby and numerous other defendants in 1954. The State Court derivative actions were consolidated under the title of *Zenn* v. *Anzalone*. During this period, two shareholders' derivative actions were commenced in the Federal Court, *Zenn* v. *Anzalone* and *Breswick* v. *Briggs*.

In 1955 hearings were commenced to inquire into the adequacy and fairness of a settlement offer made by the defendants in the *Zenn* consolidated shareholders' derivative actions. Respondent Robert J. Fitzsimmons was appointed the Referee by the New York State Supreme Court and the Special Master by the Federal District Court to conduct these hearings. After numerous, intensive and searching hearings were held during which thousands of pages of testimony and legal argument were considered and after the settlement proposal had been modified and improved all the actions were settled in 1959. In December of 1959, the New York State Supreme Court approved and confirmed the settlement of the consolidated stockholders' derivative actions.

None of the petitioners was a party to those proceedings. Petitioners Smith and Wiener were not even stockholders of Alleghany at the time the settlement proposal was made in 1955. Petitioner Randolph Phillips, although not a party to those proceedings, acted as a "financial consultant" to certain of the suing shareholders and, as such, was instrumental in obtaining the settlement and was an active proponent of its approval by the New York Supreme Court. For his services as a "financial consultant," Randolph Phillips was awarded $392,000 by the New York State Supreme Court in 1965. Thus ended the first chapter of this phase of the litigious history of Alleghany.

In 1960, John D. Murchison and Clint W. Murchison, Jr., suing as shareholders of Alleghany, commenced an action in the District Court for the Southern District of New York charging that Kirby, Randolph Phillips and other defendants had procured the settlement of the *Zenn* consolidated stockholders' actions by fraud.

While this action was pending and before the trial, the Murchisons gained voting control of Alleghany. They thereupon subsituted Alleghany for themselves as the plaintiff and retained the same counsel to prosecute the action.

After a lengthy trial, final judgment dismissing the action on the merits was entered on June 3, 1963, on the decision of the late Judge Dawson, *Alleghany* v. *Kirby,* 218 F. Supp. 264. An appeal was taken to the Second Circuit Court of Appeals, and that Court heard oral argument on December 2, 1963. On December 4, 1963, after argument of the appeal, Kirby regained voting control of Alleghany. On May 19, 1964, the Court of Appeals for the Second Circuit affirmed the judgment of dismissal (333 F.2d 327) and on January 12, 1965, the Court of Appeals for the Second Circuit sitting *en banc* by a 4-4 vote adhered to the judgment of affirmance (340 F.2d 311). The independent directors of Alleghany then decided to proceed no further with this litigation. Thus ended the second chapter of this phase of Alleghany's litigious history.

In April of 1965, two minority shareholders of Alleghany, Margaret L. Holt and Kathleen L. McMahon, sought leave to intervene for the purpose of filing a petition for a Writ of Certiorari in this Court. Their application was denied by Chief Judge Ryan on April 9, 1965, and the Court of Appeals for the Second Circuit affirmed Chief Judge Ryan's decision and order thereon. *Alleghany Corp.* v. *Kirby,* 344 F.2d 571. Both the District Court and the Court of Appeals found that the petitioners, Holt and McMahon, had no right to intervene because their application was not timely and because they had not established inadequacy of representation. Thereafter, this Court

granted certiorari on both the denial of intervention and the affirmance by the Court of Appeals of the action on the merits. After a full hearing on both questions, this Court dismissed both writs of certiorari as improvidently granted. *sub nom Holt* v. *Alleghany Corp.*, et al., 384 U.S. 28 (1966). Thus ended the third chapter of this phase of Alleghany's litigious history.

Prior Proceedings Below by the Present Petitioners

By Notice of Motion dated October 21, 1966, petitioners herein moved in the District Court for the Southern District of New York for an order pursuant to Rule 60(b)(4) FRCP, granting them leave to intervene for the purpose of declaring void the judgment entered in *Alleghany* v. *Kirby* on June 3, 1963.[3] That motion was predicated on the contention repeated herein that after the Court of Appeals for the Second Circuit heard oral argument on the appeal and before it affirmed, defendant Kirby gained control of Alleghany. Alleghany opposed that motion on the ground *inter alia* that the judgment was valid since the case had not ceased to be a justiciable case or controversy when it was decided by the Court of Appeals for the Second Circuit or by this Court.

In denying petitioners' motion below in the District Court, Judge Weinfeld held that the issue of the shift in control of Alleghany had been disclosed to the Court of Appeals prior to the *en banc* decision and that this issue had in fact become the critical issue before the panel of the Court of Appeals which sustained the denial of the application for intervention made in 1965 by the petitioners Holt and McMahon.[4] Moreover, as the record shows, the issue

---

[3] Elizabeth Most, the wife of petitioners' attorney herein, was also a party to this proceeding in the District Court.

[4] Petitioners have not included the decision of Judge Weinfeld as part of their appendix. That decision is, however, included as part of the appendix to the brief of the respondents who are guardians of the property of Allan P. Kirby, Jr.

of the shift in control of Alleghany had been disclosed to the Court of Appeals prior to the argument before the original three judge panel of the Court of Appeals which affirmed the dismissal of the complaint in *Alleghany* v. *Kirby*.

Petitioners then petitioned the District Court for an order vacating Judge Weinfeld's decision on the ground that Judge Weinfeld did not have jurisdiction to entertain their motion. Petitioners so argued despite the fact that in support of their motion before Judge Weinfeld they argued that the District Court did have jurisdiction to consider the motion. Petitioners' petition to vacate Judge Weinfeld's decision was denied on December 9, 1966. Thus was concluded the first part of the fourth chapter of this phase of the litigious history of Alleghany.

On June 18, 1966, petitioners Smith and Weiner commenced an action in the District Court for the Southern District of New York captioned *Smith* v. *Fitzsimmons et al.* The complaint in that action repeated the charges made originally in *Alleghany* v. *Kirby* that the settlement in *Zenn* had been procured by fraud, alleging this time that the fraud was between Kirby and Fitzsimmons rather than Kirby and Randolph Phillips. Randolph Phillips reappeared in *Smith* v. *Fitzsimmons* as an advisor to the present petitioners. The complaint in that action sought to vacate the *Zenn* settlement and to rescind the 1949/50 IDS transactions. The complaint also sought to have Fitzsimmons return the money he had received as Referee and Special Master. And finally the complaint sought the liquidation and dissolution of Alleghany.

The petitioners moved for summary judgment on the first count of the complaint. Defendant Alleghany moved to dismiss the complaint on the ground that the petitioners were not entitled to the relief sought against it. The individual defendants moved for summary judgment. Alleghany also requested an order taxing its reasonable attorneys' fees against the petitioners and their counsel.

The District Court per Bonsal, *J.*, granted Alleghany's motion to dismiss the complaint and granted the motions of the individual defendants for summary judgment, stating that

> "... this action which seeks to reopen the Alleghany litigation on the basis of conclusory and unsupported allegations of fraud hardly appeals to the conscience of a court of equity ..." (Petitioners' App. p. 77a)[5]

The District Court did not tax attorneys' fees but warned that any further attempts by petitioners' attorney to reopen this litigation might result in his being personally liable for defendants' attorneys' fees.

Thus was concluded the second part of the fourth chapter of this phase of Alleghany's litigious history.

Petitioners then appealed to the United States Court of Appeals for the Second Circuit from the order of the District Court per Weinfeld, *J.*, denying their motion to vacate Judge Weinfeld's prior decision denying their motion to vacate the judgment in *Alleghany* v. *Kirby* and from the order per Bonsal, *J.*, granting the defendants' motions for summary judgment and for judgment dismissing the complaint in *Smith* v. *Fitzsimmons*.

While those appeals were pending and prior to argument, petitioners applied to the Court of Appeals for the Second Circuit for an application to that Court sitting *en banc* for an order under Rule 19(c) directing petitioners to conduct an investigation to aid the Court in determining if its judgment was procured by fraud upon it and the "absent parties." The Court of Appeals for the Second Circuit directed that this application be heard by the same panel scheduled to hear the appeals in *Alleghany* v. *Kirby* and *Smith* v. *Fitzsimmons*.

---

[5] The memorandum decision of Judge Bonsal is reported at 264 F. Supp. 268.

The charges leveled by petitioners in their Rule 19(c) application were the same charges of fraud that had been previously held groundless in *Smith* v. *Fitzsimmons*. In the 19(c) application, however, Randolph Phillips submitted certain memoranda allegedly made by him in 1960.

The Court of Appeals for the Second Circuit, after considering all of the so-called evidence, including the Phillips' memoranda, denied the application pursuant to Rule 19(c), stating

> "At most, the application stands on a porous foundation and, in any case, our consideration of it is barred by reason of the litigation of the same issues in *Smith* v. *Fitzsimmons* and their determination by Judge Bonsal on summary judgment sought by plaintiffs themselves. All the matter put forth in support of the so-called 19(c) motions was or could have been presented to Judge Bonsal and may not be held back and subsequently used as the basis for relitigation of the same issues." (394 F. 2d at 394; Petitioners' App. 2159).

The decision of the Second Circuit also affirmed the order of the District Court denying petitioners' motion to intervene in *Alleghany* v. *Kirby* for the purpose of declaring the judgment therein void and affirmed the order of the District Court in *Smith* v. *Fitzsimmons*.

After the decision of the Second Circuit Court of Appeals was filed, petitioners moved to vacate it and the judgment entered thereon. Petitioners' motion to vacate was denied without opinion on June 5, 1968.

Thus was concluded part three of chapter four of this phase of Alleghany's litigious history.

Petitioners now petition this Court for a Writ of Certiorari to review the aforesaid decisions of the Second Circuit Court of Appeals, thus commencing part four of chapter four of this phase of the litigious history of Alleghany.

Questions Presented

Petitioners suggest that some nine different questions are presented by their petition and offer six reasons why this Court should grant a Writ of Certiorari. In fact, the petition presents one question, the answer to which has never been in doubt: Where stockholders' derivative suits have been settled with court approval after extensive hearings and the settlement was subsequently attacked as having been procured by fraud by two different groups of shareholders at two different times and the United States District Court, the United States Court of Appeals, and this Court have rejected the attacks on the settlement, can a third group of shareholders such as the petitioners herein (one of whom appeared in this Court as an *amicus* in one of the prior attempts to reopen the settlement) endlessly attack the settlement by conjuring up new theories of fraud and alleged error? The decision of the Court of Appeals correctly answered that question in the negative. The Court of Appeals also found that after reviewing the evidence of fraud petitioners' attempts to reopen the *Zenn* settlement stood at best "on a porous foundation."

A Consideration of the Reasons Offered by the Petitioners for the Granting of a Writ of Certiorari

I.

Petitioners argue that the assumption of jurisdiction by a three-judge panel over their appeals and motions to vacate a judgment heard and determined by the Court of Appeals sitting *en banc* constitutes an impairment of the *en banc* jurisdiction and presents an important federal question. This argument demonstrates the lengths to which petitioners will go in misusing the procedure for Federal appellate review and then in a subsequent stage in the ap-

pellate process claim that their misuse was an error that deprived them of certain undefined rights. Petitioners themselves commenced the action entitled *Smith* v. *Fitzsimmons* in the District Court for the Southern District of New York and themselves moved for summary judgment therein. It was in that action that petitioners chose to allege that the *Zenn* settlement had been procured by fraud between *Kirby, Fitzsimmons* and others. Petitioners themselves chose to move to intervene in the District Court in *Alleghany* v. *Kirby* for the purpose of declaring the judgment in that case void because the case had ceased to be a justiciable case or controversy when it was decided by the original three-judge panel which heard the first set of appeals in that case. Only after the motion to intervene in *Alleghany* v. *Kirby* was denied and defendants' motions for summary judgment in *Smith* v. *Fitzsimmons* were granted, and pending the appeal from those decisions did petitioners petition the Court of Appeals for the Second Circuit sitting *en banc* pursuant to Rule 19(c). Thus, petitioners wish this Court to review the decisions below on the merits because petitioners themselves employed various procedural steps which petitioners now claim were improper.

Petitioners also conveniently overlook the fact that their application pursuant to Rule 19(c) was referred by the Court of Appeals to the three-judge panel hearing petitioners' appeals in *Smith* v. *Fitzsimmons* and *Alleghany* v. *Kirby*.

In short, petitioners, with characteristic temerity, request this Court to review this litigation which has occupied the attention of the State and Federal Courts for some fifteen years because they now say that the procedure they employed in their three-pronged attack below was improper.

II.

Petitioners argue that the Court below decided an important question of Federal law contrary to the decisions of this Court when it held that the three-judge panel which heard the original appeal on the merits in *Alleghany* v. *Kirby* had jurisdiction notwithstanding that Kirby regained control of Alleghany after oral argument was heard. As the Court below noted, the cases relied upon by the petitioners were clearly inapposite. The Court below further noted that the issue of the shift of control was brought to the attention of the Court of Appeals and that the determination implicit in its decision that there was a controversy is *res judicata* and not open to collateral attack (394 F.2d 288-389; Petitioners' App. p. 2146-2147).

Furthermore, as noted, Randolph Phillips, one of the petitioners herein, appeared as *amicus curiae* in this Court in *Holt* v. *Alleghany*. Phillips, though presenting what he styled as a Federal question in his *amicus* brief before this Court, failed at that time to allege that the shift in control of Alleghany deprived the Court of Appeals of jurisdiction.

III.

Petitioners' third reason is in substance an amalgam of their first and second reasons. Petitioners contend that the Court below committed error when it applied the doctrine of *res judicata* to petitioners' jurisdictional questions since two of the three petitioners were not parties to the prior proceedings. Admittedly, petitioners Smith and Wiener were not *named* parties to the prior proceedings in *Alleghany* v. *Kirby* but the action was brought on behalf of all shareholders and thus binds petitioners Smith and Wiener. Petitioner Phillips was originally a defendant in *Alleghany* v. *Kirby*, and, as noted, subsequently appeared in this Court in that case as *amicus*.

Thus, stripped of its conclusory rhetoric, petitioners' third reason is an argument premised upon false factual

assumptions and contrary to fundamental legal principles regarding the nature and effect of judgments in shareholders' derivative actions.

IV.

'Petitioners' fourth reason is nothing more than a thinly disguised re-statement of their first reason. Petitioners contend that since the District Court did not have jurisdiction to consider its Rule 60(b) motion in *Alleghany* v. *Kirby,* the Court of Appeals erred when it held that the so-called evidence produced by Phillips on the Rule 19(c) application could have been presented before the District Court in *Smith* v. *Fitzsimmons.* This argument not only stands on a "porous foundation," but is a blatant attempt to create an issue by confusing two separate and unrelated determinations by the Courts below.

In their Rule 60(b) motion in *Alleghany* v. *Kirby,* petitioners contended that the three-judge panel that heard the original appeal in *Alleghany* v. *Kirby* lacked jurisdiction because of the shift in control of Alleghany. In *Smith* v. *Fitzsimmons,* petitioners leveled their charges of fraud in the procurement of the *Zenn* settlement. *Smith* v. *Fitzsimmons* was a new action commenced by the present petitioners and did not involve any Rule 60(b) motion. The Court of Appeals held that it was not necessary to determine whether the Rule 60(b) motion should have been made in the District Court only after applying for leave to so move from the Court of Appeals, since it held on the merits that the shift in control of Alleghany Corporation did not deprive the original three-judge panel of jurisdiction.

That determination by the Court below had no bearing whatsoever on the failure of petitioners to submit the Phillips' memoranda to the District Court when the motions for summary judgment were heard in *Smith* v. *Fitzsimmons* by Judge Bonsal. Moreover, the decision below makes it clear that the Court of Appeals not only found that the so-called

evidence consisting of the Phillips' memoranda was or could have been put before Judge Bonsal but that after its consideration of that evidence it concluded that "at most, the [19c] application stands on a porous foundation . . ."

V.

Petitioners' fifth and sixth reasons are merely attempts to have this Court review and re-evaluate the evidence which the Courts below have previously examined. Petitioners argue that the decisions below involved the standard of conduct to be applied to a Federal Special Master. In fact, the decisions below clearly enunciate a high standard of conduct to be applied to a Federal Special Master consistent with the existent statutory and decisional law and conclude that petitioners completely failed to demonstrate that those standards were not met.

Alleghany and the State and Federal judiciaries have been embroiled in this litigation for decades. The expense and nuisance of the constant, continuous relitigation of an ancient transaction are beyond estimate. The independent directors of Alleghany long ago determined that further proceedings could only burden all concerned rather than benefit the corporation, and the courts have several times sustained that determination as well as the validity of the settlement sought to be upset by the petitioners. Now at last an end should be declared and final judgments accorded the finality they were intended to have.

CONCLUSION

For all of the foregoing reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

VINCENT R. FITZPATRICK
Counsel for Respondent
Alleghany Corporation

ANTHONY F. PHILLIPS
Of Counsel